Supreme Court, U.S.
FILED

(1)

03 581 SEP 25 2003

In the

Supreme Court of the United States

RENEE NEAVES, an individual; DAVID NEAVES, an individual; MAKENZIE NEAVES, a minor by her guardian ad litem, EARL PAHLOW,

Petitioners,

v.

CITY OF SAN DIEGO, a public entity; ROY DOAKES, RENEE HILL, ROGER B. MICHAEL, KEVIN HOFLEN, and JERRY SANDERS, individually and in their official capacities,

Respondents.

Petition for a Writ of Certiorari to the
The United States Court of Appeals
for the Ninth Circuit

PETITON FOR WRIT OF CERTIORARI

Robert A. Waller, Jr.
Counsel of Record
The Law Office of
Robert A.Waller, Jr.
2235 Encinitas Boulevard
Suite 212
Encinitas, California 92024
(760) 753-3118
Attorney for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦USSCINFO.COM

54 AP

QUESTIONS PRESENTED FOR REVIEW

1. Whether the pleading requirements for a backward-looking denial of access claim enumerated in *Christopher v. Harbury*, 536 U.S. 403 (2002), are controlling over the Ninth Circuit's more restrictive rule in *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998).

2. Whether a "backward-looking" denial of access to the courts claim will lie where there exists "multiple sufficient causes" frustrating the underlying state court action.

3. Whether the "class of one" equal protection analysis requires that the plaintiffs are members of an "identifiable class," as required by the Ninth Circuit in this case.

4. Whether, in order to state a claim under the "class of one" equal protection analysis, the plaintiff must allege that harming the plaintiff was the subjective motivation behind the defendant's conduct in treating the plaintiff differently than those similarly situated.

PARTIES TO THE PROCEEDINGS

The names of all the parties to the proceedings before the United States Court of Appeals for the Ninth Circuit are listed in the caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. This Petition Should be Granted because the Ninth Circuit Decided the Important Federal Question of Denial of Access to the Courts in Direct Contravention of Controlling Supreme Court Precedent 7

II. This Petition Should be Granted because the Ninth Circuit Decided the Important Federal Question of Denial of Equal Protection in Direct Contravention of Controlling Supreme Court Precedent 10

CONCLUSION 13

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED JUNE 27, 2003 ..... 1a

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, DATED OCTOBER 12, 2001 ..... 12a

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, DATED FEBRUARY 21, 2002 ..... 23a

TABLE OF AUTHORITIES

CASES

CHRISTOPHER V. HARBURY, 536 U.S. 403 (2002) ..... i, 7, 8

DELEW V. WAGNER, 143 F.3D 1219 (1998) ..... i, 7, 8, 9

VILLAGE OF WILLOWBROOK V. OLECH, 528 U.S. 562 (2000) 10, 11, 12

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 1331, 1343 6

28 U.S.C. §1291 7

FRCP 12(B)(6) 7, 10

PETITION FOR A WRIT OF CERTIORARI

The petitioners, Renee Neaves, Scott Neaves, and Makenzie Neaves, by her guardian ad litem, Earl Pahlow, respectfully request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated June 27, 2003, is not published, but can be found at 2003 WL 21500201 and is reprinted at pages App. 1a to 11a of the Petitioners' Appendix. The opinions of the District Court for the Southern District of California, dated October 12, 2001 and February 21, 2002, respectively, are not published, but are reprinted at pages App. 12a to 35a of the Petitioners' Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 27, 2003. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article IV, Section 2:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V:

> ...No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment XIV, Section 1:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 1, 1996, at 3:00 p.m., three-year old Scott Neaves was pronounced dead at Children's Hospital in San Diego. Scott died from "shaken baby" injuries sustained at the hand of his babysitter, Wendy Cummings, the daughter of then San Diego Police Department Sergeant Roger B. Michael.

This civil rights action stems from the actions and inactions of members of the San Diego Police Department (SDPD) in response to Scott's death.

The injuries leading to Scott's death occurred on March 29, 1996 at the home of Wendy Cummings. Petitioner Renee Neaves had entrusted her children, Scott and Makenzie, to Cummings for the day. At 2:31 p.m. Cummings called 9-1-1 because Scott had collapsed on the floor and was unresponsive. An ambulance took Scott to Children's Hospital, where he remained unconscious until his death three days later.

In response to a report of suspected child abuse by hospital personnel, officers were dispatched to Cummings' home to investigate. Cummings' father, SDPD Sergeant Roger Michael, and fellow Sergeant Kevin Hoflen, responded to the radio dispatch and rushed to the scene at Cummings' house. Sergeant Michael was on duty, in uniform, driving a marked patrol car, and the most senior officer at the scene. Despite the suspected child abuse and suspicious nature of Scott's injuries, and contrary to standard police procedure used by SDPD in similar child abuse investigations, the area inside Cummings' home where Scott collapsed was not roped-off, not a single piece of physical evidence was collected, not a single photograph of the scene was taken, and not a single witness was interviewed. Also, contrary to standard police procedure, Cummings was allowed to speak at length with her father before being interviewed by Detective Roy Doakes, the child abuse detective assigned to the investigation. Cummings was not interviewed by Doakes until the following day. When Detective Doakes did finally interview Cummings, she admitted that she had forcefully taken Scott from a back bedroom and put him against a wall in the kitchen until

he could "act like a big boy." It was then that Scott collapsed with severe brain swelling and subdural hemotoma.

Following Scott's death, Homicide Detective Frederico Gil was assigned to investigate Scott's death. Contrary to SDPD policy and standard investigation procedures, Cummings' father was included in and informed of every step in the investigation into Scott's death, despite the fact that his daughter, Cummings, was identified as the prime suspect. On June 10, 1996, as an integral part of the investigation, Detective Gil arranged for SDPD interview/interrogation specialist, Paul Redden, to conduct a polygraph examination of Cummings regarding Scott's injuries and death. Contrary to all normal investigative protocol, Cummings' father was allowed to be present during the examination. Sergeant Michael, along with Detective Gil and Redden tainted the results of Cummings' polygraph by coaching her before and during the examination, and then fabricating the results. The defendants claim Cummings passed the polygraph, and Redden prepared a written report to that end. However, according to the City's own expert witness retained in the underlying litigation, Cummings did not, in fact, pass the polygraph in large part because she vomited during the administration of the test. The defendants concealed that Cummings vomited during the polygraph, and omitted that fact from all police reports entirely. Redden, Gil and Michael never told anyone about Cummings vomiting, and insisted that she had "passed with flying colors."

Immediately after Cummings "passed" the polygraph examination, Detective Gil closed the investigation into Scott's homicide. Only after pressure from the Neaves and other concerned citizens, did the SDPD reopen the investigation into Scott's death.

However, they did so with no intent to gather evidence about Scott's killer, but instead to build put together an incomplete case against Cummings that would be rejected for prosecution by the District Attorney's office.

In December 1997, the police submitted the case to the District Attorney's office for prosecution, knowing by their own admission, they had not done a proper investigation and had not collected enough evidence to prosecute Cummings for Scott's death. As expected, the case was rejected for a lack of evidence. Within a month of the rejection by the district attorney's office, the police officially closed the case – an unusual step, since it is standard police practice to keep unsolved homicide cases open indefinitely.

In March 1997, shortly before the state statute of limitations expired, the Neaves filed a wrongful death action against Cummings in California state court. The state court action was stayed in August 1998 when Cummings filed bankruptcy, just days before the depositions of the investigating police officers and Cummings' father were to take place. In November 1998, the Bankruptcy Court discharged Cummings' debts, which consisted only of the Neaves' wrongful death action.

Following the bankruptcy, in January 1999, the Neaves filed this civil rights action in the U.S. District Court for the Southern District of California against the City of San Diego, the investigating officers, and Cummings' father, Michael, for denial of access to the courts and denial of equal protection, based on allegations that the defendants had participated in a conspiracy to cover-up the cause of Scott's death, impede the investigation, and to destroy, overlook, or

fabricate evidence. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343.

On October 4, 2000, the City filed a motion for summary judgment against the Neaves' first cause of action for denial of access to the courts. On February 7, 2001, the District Court granted the motion, without prejudice, on the ground that the Neaves' denial of access claim was not ripe because the underlying wrongful death action against Cummings was still pending and had not been formally dismissed by the state court.

In July 2001, in response to the District Court's order, the Neaves petitioned the Bankruptcy Court to reopen bankruptcy proceedings, and permit the wrongful death action against Wendy to proceed to trial in state court. On July 25, 2001, the petition was denied. On August 3, 2001, the state court dismissed the Neaves' wrongful death action, without prejudice, on the ground that Cummings was protected from defending the suit by the bankruptcy.

On August 21, 2001, the City filed a motion for summary judgment against the Neaves' Equal Protection claims. On October 12, 2001, the District Court granted the City's motion for summary judgment on the ground that the Neaves failed to raise triable issues of fact on their equal protection claims. The District Court, taking notice of the Superior Court's dismissal of the wrongful death suit against Cummings, granted the Neaves leave to file a Fourth Amended Complaint, to renew their claim for denial of access to the courts, since the state wrongful death action was no longer pending.

On November 15, 2001, the Neaves filed the Fourth Amended Complaint against the City, alleging

denial of access to the courts. On December 3, 2001, the City moved to dismiss the Neaves' denial of access claims pursuant to FRCP Rule 12(b)(6). On February 21, 2002, the District Court granted the City's motion to dismiss the Neaves' claims for denial of access to the courts. In dismissing the Neaves' denial of acces to courts claim, the District Court relied on the Ninth Circuit's decision in *Delew v. Wagner*, 143 F.3d 1219 (1998), which held that in order for a claim for denial of access to the courts to lie, the plaintiff must show, by reason of an unfavorable verdict in the underlying state court action, that the actions of the police actually rendered any state court remedy ineffective. App. 26a.

The Neaves appealed the summary judgment ruling on the equal protection claims, and the dismissal of the denial of access to courts claims to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1291. On June 27, 2003, in a split decision, the Ninth Circuit affirmed the District Court's grant of summary judgment and dismissal. This timely Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Decided the Important Federal Question of Denial of Access to the Courts in Direct Conflict with U.S. Supreme Court Precedent.

In affirming the dismissal of the Neaves' denial of access to courts claim, the Ninth Circuit imposed an additional element on the pleading requirements for a "backward-looking" denial of access to the courts claim as enumerated by the United States Supreme Court in *Christopher v. Harbury*, 536 U.S. 403 (2002).

According to *Christopher*, the plaintiff must identify 1) a non-frivolous, arguable underlying claim, whether anticipated or lost, 2) the official acts frustrating litigation, and 3) a remedy that may be awarded as recompense not otherwise available in some suit that may yet be brought. *Id* at 415.

In its opinion, the Ninth Circuit stated the pleading requirements outlined in *Christopher*, but ultimately decided the matter on an additional element unique to Ninth Circuit case law:

> Our circuit further requires that a party, in order to prevail on a denial of access claim, 'demonstrate that the defendant's cover-up violated their right of access to the courts by rendering any available state court remedy ineffective'. Here the bankruptcy court proceedings rendered appellants' wrongful death action ineffective. We can never know what would have happened if the bankruptcy court case had not precluded the state lawsuit. Because appellants can not demonstrate that the defendants' alleged cover-up rendered any state court remedy ineffective, the district court properly dismissed their denial of access to courts claim. Ninth Circuit Opinion, App. 3a, citing *Delew v. Wagner*, 143 F.3d 1219, 1223-24 (9th Cir. 1998).

The Ninth Circuit refused to apply the controlling law of *Christopher*, following instead its own rule in *Delew*. Under *Delew*, to have a valid claim for denial of access to the courts, the plaintiff must have had an underlying claim, which was fully adjudicated, resulting in an

unfavorable verdict, due solely to the official actions alleged.

Delew is impermissibly more restrictive of plaintiffs' constitutional rights that the law outlined by this Court in *Christopher*, as well as the law outlined by the decisions of other circuits examined by this Court in *Christopher*. Most relevant to this case, *Delew* overlooks situations in which there are "multiple sufficient causes" frustrating the plaintiffs' underlying state court action.

The Restatement (Third) Of Torts explains that when an actor's conduct is not the factual cause of the plaintiff's harm under the "but-for" test because another cause exists at the same time that is equally sufficient to cause the harm, the theory of "multiple sufficient causes" operates to deem both causes "factual" causes of the plaintiff's harm. Restatement (Third) Of Torts: Liab. Physical Harm § 27. Courts have long imposed liability when a tortfeasor's conduct, while not necessary for the outcome, would have been a factual cause if the other competing cause had not been present. *Id*, § 27, comment *a*.

The Ninth Circuit in this case held that the bankruptcy, not the police cover-up, was the only factual cause frustrating the Neaves' underlying state court wrongful death action against Cummings. However, the bankruptcy and the police cover-up were multiple sufficient causes of the frustration. The but-for standard does not operate to establish factual causation in this case, since "but for the bankruptcy," the Neaves' wrongful death action against Cummings would still have been frustrated by the police cover-up; and, likewise, "but for the police cover-up," the wrongful

death action would still have been frustrated by the bankruptcy.

The Ninth Circuit failed to consider the multiple sufficient causes frustrating the Neaves' underlying state court action against Cummings. Had the Ninth Circuit considered "multiple sufficient causes" it would have concluded differently and determined that the Neaves have in fact stated a claim for denial of access to courts.

Accordingly, the cover-up and the bankruptcy are "multiple sufficient causes," and should both be deemed factual causes of the frustration of the Neaves' underlying action against Cummings. Further, whether two conditions are in fact "multiple sufficient causes" of the plaintiff's harm is a question of fact for the jury and is not properly disposed of on a motion to dismiss under FRCP 12(b)(6) or a motion for summary judgment. Restatement (Third) § 27, Illustration 2.

II. The Ninth Circuit Decided the Important Federal Question of "Class of One" Equal Protection in Direct Conflict with U.S. Supreme Court Precedent.

In its opinion in this case, the Ninth Circuit misstated the law applicable to "class of one" equal protection claims. This Court set forth the controlling law on the issue in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). In *Village of Willowbrook*, this Court explained that "class of one" equal protection claims are successful "where the plaintiff has alleged that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.*,528 U.S. at 563. In affirming the District Court's grant of summary judgment against the Neaves on their equal protection

claims, the Ninth Circuit clearly misstated the controlling law of *Village of Willowbrook*. The Ninth Circuit impermissibly held:

> Equal protection rights are violated when (1) a person is a member of an identifiable class; (2) that person is intentionally treated differently from others similarly situated; and (3) there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Ninth Circuit Opinion App. 3a.

Nowhere in *Village of Willowbrook* does this Court even mention membership in an "identifiable class," much less include such class membership as a requirement for a "class of one" equal protection claim.

In its opinion, the Ninth Circuit also improperly added to the "class of one" analysis, a requirement that the plaintiffs show the defendants acted with "discriminatory intent," and relied on Supreme Court precedent in the area of race-based equal protection claims to define "discriminatory intent" in the "class of one" setting. The Ninth Circuit held:

> Discriminatory intent implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker...selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of', its adverse effects upon an identifiable group. Ninth Circuit Opinion App. 3a to 4a.

However, no such showing is required by the holding in *Village of Willowbrook*, which requires only that the

defendants treated the plaintiffs differently than others similarly situated, and the different treatment was irrational and wholly arbitrary, "**quite apart from [the defendants'] subjective motivation**." *Id.*, 120 S.Ct. at 1075 (emphasis added). *Village of Willowbrook* makes clear that, in a "class of one" equal protection analysis, it is not necessary that the defendant acted because of some subjective animus toward the plaintiff personally, as long as (1) the defendant purposely treated the plaintiff differently than those similarly situated, the (2) defendant's actions were "irrational and wholly arbitrary," and (3) there was no rational basis for the different treatment. *Ibid.*

The Ninth Circuit agreed that the defendants in this case intentionally treated the Neaves differently than those similarly situated. It is also undisputed, as noted in the Ninth Circuit's opinion, "that any improper conduct by defendants was motivated by a desire to protect the babysitter," the daughter of a San Diego police sergeant. 9th Cir. Opinion at p. 5., App. 5a. Such actions by the defendants are surely "irrational and wholly arbitrary," and the defendants have never in the history of this litigation advanced a rational basis for treating the Neaves differently.

Yet, despite these facts, the Ninth Circuit ignored the controlling law and erroneously concluded that the Neaves have not stated a claim under a "class of one" equal protection analysis, and affirmed the rulings of the district court.

CONCLUSION

Wherefore, Petitioners respectfully request that this Honorable Court grant this Petition for a Writ of Certiorari and review and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

ROBERT A. WALLER, JR.
Counsel of Record
THE LAW OFFICE OF
ROBERT A. WALLER, JR.
2235 Encinitas Boulevard
Suite 212
Encinitas, California 92024
(760) 753-3118
Attorney for Petitioners

(Any footnotes trail end of each document)

No. 02-55512

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RENEE NEAVES; DAVID NEAVES, an individual; MAKENZIE NEAVES, a minor by her guardian ad litem, EARL PAHLOW,
Plaintiffs - Appellants,

v.

CITY OF SAN DIEGO, a public entity; ROY DOAKES, individually and in his official capacity; FREDERICO GIL, individually and in his official capacity; RENEE HILL, individually and in her official capacity; ROGER B. MICHAEL, individually and in his official capacity; PAUL REDDEN, individually and in his official capacity; KEVIN HOFLEN, individually and in his official capacity; JERRY SANDERS, Chief of Police, Individually and in his official capacity as Chief of Police,
Defendants - Appellees,

and,

DOES 1-20,
Defendant.

April 10, 2003, Argued and Submitted,
Pasadena, California
June 27, 2003, Filed

COUNSEL: For RENEE NEAVES, DAVID NEAVES, MAKENZIE NEAVES, EARL PAHLOW, Plaintiffs - Appellants: Robert A. Waller, Jr., Esq., San Diego, CA.

For CITY OF SAN DIEGO, ROY DOAKES, FREDERICO GIL, RENEE HILL, ROGER B. MICHAEL, PAUL REDDEN, KEVIN HOFLEN, JERRY SANDERS, Defendants - Appellees: Eugene P. Gordon, Esq., OFFICE OF THE CITY ATTORNEY, San Diego, CA.

JUDGES: Before: BEEZER, FERNANDEZ, and PAEZ, Circuit Judges. Paez, concurring in part, dissenting in part.

OPINION: MEMORANDUM *

We affirm the district court's dismissal of appellants' denial of access to the courts claim and the district court's summary judgment of appellants' (1) claims of deprivation of equal protection and (2) claim of an unreasonable seizure. n1

I

Appellants argue that the district court erred in dismissing their denial of access to courts claim. The Supreme Court recently clarified the nature of the denial of access claim. See Christopher v. Harbury, 536 U.S. 403, 153 L. Ed. 2d 413, 122 S. Ct. 2179 (2002). In Christopher, the Supreme Court distinguishes between forward-looking and backward-looking claims. Id. at 414. The Supreme Court notes that in order to state a claim for backward-looking denial of access, a party must identify in the complaint (1) a "nonfrivolous," "arguable" underlying claim, whether anticipated or lost; (2) the official acts frustrating the litigation; and (3) a remedy that may be awarded as recompense but that is not otherwise available in a future suit. Id. at 415.

The Court in Christopher does not establish a new rule, but rather articulates the common elements of the

backward-looking denial of access claim as recognized by various circuits. See id. at 414-16. Our circuit further requires that a party, in order to prevail on a denial of access claim, "demonstrate that the defendant's cover-up violated their right of access to the courts by rendering any available state court remedy ineffective." Delew v. Wagner, 143 F.3d 1219, 1223-24 (9th Cir. 1998).

Here, the bankruptcy court proceedings rendered appellants' wrongful death action ineffective. We can never know what would have happened if the bankruptcy court case had not precluded the state lawsuit. Because appellants can not demonstrate that the defendants' alleged cover-up rendered any state court remedy ineffective, the district court properly dismissed their denial of access to courts claim.

II

Appellants appeal the district court's grant of summary judgment against their claims that: (1) the defendants deprived the appellants of equal protection by failing to investigate the death of Scott Neaves; and (2) the polygraph operator deprived the appellants of equal protection by lying about the results of the babysitter's polygraph test.

Equal protection rights are violated when (1) a person is a member of an identifiable class; (2) that person is intentionally treated differently from others similarly situated; and (3) there is no rational basis for the difference in treatment. Village of Willowbrook v. Olech, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 120 S. Ct. 1073 (2000). Discriminatory intent "implies more than intent as volition or intent as awareness of consequences. It implied that the decision maker ... selected or reaffirmed a particular course of action at least in part 'because of,'

not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979); see also City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., U.S. , 155 L. Ed. 2d 349, 123 S. Ct. 1389, 1394 (2003). Here, the district court held that appellants were an identifiable class, but that appellants had not shown that the defendants acted with an intent or purpose to discriminate against them.

Appellants argue that when the defendants denied them police services, the defendants engaged in intended conduct with the inevitable or foreseeable consequence that the appellants would be denied equal protection. In certain instances, a violation of equal protection can occur when an officer acts with a discriminatory intent in refusing to investigate a particular case. See e.g., Estate of Macias v. Ihde, 219 F.3d 1018, 1028 (9th Cir. 2000); Navarro v. Block, 72 F.3d 712, 716-17 (9th Cir. 1995). In these instances, however, it is the victims themselves, not a relative or another third party, who have alleged a violation of their equal protection rights based on discriminatory police conduct. See e.g., Estate of Macias, 219 F.2d at 1028; Navarro, 72 F.3d at 716. In addition, our refusal to investigate cases have involved findings of discriminatory intent based upon membership in a particular class. See e.g., Estate of Macias, 219 F.2d at 1020, 1028 (involving discrimination against a person based on her status as a woman and as a domestic violence victim); Navarro, 72 F.3d at 717 (involving discrimination against a member of a class composed of domestic violence victims). Here, appellants may have been treated differently, but they have not shown discriminatory intent.

Appellants argue that defendants acted with discriminatory intent by citing three other cases

involving the deaths of young children that occurred under circumstances which are arguably similar to the circumstances surrounding Scott Neaves' death and which were investigated differently. It is undisputed, however, that any improper conduct by defendants was motivated by a desire to protect the babysitter, rather than by an intention to discriminate against the appellants because of their membership in a class. Looking at the evidence in the light most favorable to the appellants, the defendants did not fail to provide police services "because of" appellants' membership in a certain class. Rather, the defendants acted to protect the babysitter, "in spite of" any adverse effects on the appellants. Absent evidence of discriminatory intent, appellants' equal protection claims fail. n2 The district court's decision is correct.

III

Appellant Makenzie Neaves appeals the district court's grant of summary judgment against Makenzie's unlawful seizure claim. The grant of summary judgment was based on defendants' qualified immunity.

In order to determine whether the defendants are entitled to qualified immunity, we first determine whether the facts alleged, taken in the light most favorable to the appellants, show that the defendants' conduct violated a constitutional right. Saucier v. Katz, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). If a violation of a constitutional right is shown, then we determine whether the right was so clearly established at the time that a reasonable officer would have known that his or her conduct was unlawful. Id. at 201-02.

In order to determine whether a constitutional violation

has occurred, we determine whether there was an unlawful seizure. Officials may remove a child without a warrant from parental custody when the official has a "reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury." n3 Wallis v. Spencer, 202 F.3d 1126, 1138 (9th Cir. 1999).

The defendants had reasonable cause to believe Makenzie was in imminent danger. Makenzie's brother, Scott, had sustained life-threatening injuries potentially caused by abuse. The defendants did not know at the time who was responsible for Scott's injuries. In response, the defendants temporarily separated Makenzie from both her parents and her babysitter for the child's protection.

Appellants claim that the scope of intrusion involved in seizing Makenzie was excessive in that Makenzie could have been placed with her father, who was identified as a "non-suspect" in the child abuse investigation. The officers knew, however, that Makenzie's parents were married and that placing Makenzie with her father would not necessarily remove Makenzie from the risk of her mother, who was a suspect in the child abuse investigation.

In addition, the brief period during which Makenzie was separated distinguishes her seizure from an unlawful seizure. Cf. Wallis, 202 F.3d at 1131 (holding summary judgment improper where, on the basis of a fantastical allegation of a planned satanic ritual alleged by an estranged relative hospitalized in a psychiatric facility, children were taken away from their parents for two and one-half months, during which time the children underwent intrusive anal and vaginal physical

examinations). A brief separation of a few days from both parents, when the parents are married and presumably living together and when one parent is suspected of committing child abuse, is not excessively intrusive.

The district court properly determined that there was no violation of Makenzie's constitutional rights. n4 Defendants had reasonable cause to believe that Makenzie was in imminent danger of serious bodily injury and the scope of the intrusion caused by temporarily separating Makenzie from her parents was reasonably necessary to avert that danger. We affirm the district court's grant of summary judgment against Makenzie's claim of unlawful seizure on the basis of qualified immunity.

Footnotes

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

n1 The facts are not recited here as the parties are familiar with the facts of this case.

n2 We also note that the Neaves' have no "judicially cognizable interest" in having the babysitter prosecuted. See Diamond v. Charles, 476 U.S. 54, 64, 90 L. Ed. 2d 48, 106 S. Ct. 1697 (1986).

n3 California Welfare and Institutions Code § 305 contains similar language. Section 305 proves that any peace officer may, without warrant, take into temporary custody a minor "when the officer has reasonable cause for believing that the minor ... is in immediate danger of physical or sexual abuse, or the physical environment ...

poses an immediate threat to the child's health or safety."

n4 The district court also stated that, even if Makenzie's constitutional rights were violated, the officers did not violate clearly established rights because a reasonable officer would not have known that his or her conduct was unlawful. We agree.

AFFIRMED.

CONCURBY: Paez (In Part)

DISSENTBY: Paez (In Part)

DISSENT: Paez, concurring in part, dissenting in part:

I concur in Parts I and III of the memorandum disposition. I respectfully dissent, however, from the majority's decision in Part II to affirm the district court's summary dismissal of the Neaves' equal protection claim. Because there are triable issues of fact regarding the defendant officers' intent, I would reverse the district court's ruling on this claim and remand for further proceedings.

As noted by the majority, we have recognized an equal protection claim when police officers have allegedly acted with discriminatory intent in refusing to investigate alleged criminal acts against a victim. See e.g., Estate of Macias v. Ihde, 219 F.3d 1018, 1028 (9th Cir. 2000); Navarro v. Block, 72 F.3d 712, 716–17 (9th Cir. 1995). Although the Macias and Navarro claims were either brought by the victim or the estate of a deceased victim, I do not believe that the equal protection analysis we employed in those cases should be limited to plaintiffs who were crime victims, as the

majority seems to suggest. Indeed, the Equal Protection Clause guarantees that all persons who are similarly situated are entitled to equal treatment by government officials. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). Thus, an individual who alleges that a police officer intentionally treated him or her differently than other similarly-situated individuals and alleges that there was no rational basis for the difference in treatment states a viable Fourteenth Amendment Equal Protection Claim. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 120 S. Ct. 1073 (2000).

Although the summary judgment record does not reflect that the Neaves explicitly requested an investigation of their son's death, we can reasonably infer from the record that the Neaves made such a request. As the record reflects, the police immediately suspected that there might have been criminal conduct involved in their son's death, and there is nothing in the record to show that the Neaves were a target of the investigation. Because the Neaves are entitled to all reasonable inferences in resisting summary judgment, it is reasonable to infer, in the circumstances of this case, that the Neaves requested the police to investigate the death of their son, especially after the coroner declared his death to be a homicide. When viewed in this context, the Equal Protection claim is analogous to those cases in which individuals requested police services and were denied such services or were afforded inferior services. See Macias, 219 F.3d at 1028; Navarro, 72 F.3d at 716–17.

Moreover, as I understand the Neaves' Equal Protection claim, it is not tied to their denial of access claim. They made this point in their opposition to Defendants' summary judgment motion and at oral argument before this panel. If the Neaves can prove that they were

treated differently from other similarly situated individuals, then they could recover damages for any injury they suffered – including emotional distress. See Carey v. Piphus, 435 U.S. 247, 264, 55 L. Ed. 2d 252, 98 S. Ct. 1042 (1978) (holding that damages for emotional distress are available under § 1983). Indeed, the Neaves contend that they suffered injury, not from denial of access to the courts, but from the unequal treatment that they received during the defendants' investigation of their son's death.

The majority concludes that even if the Neaves were treated differently from other similarly situated individuals, they failed to show that Defendants acted with an intent or purpose to discriminate against them because of their membership in a class. Although the Neaves must demonstrate that the police officers acted "'because of,' not merely 'in spite of'" the Neaves' desire to see Cummings held responsible for the death of their son, see Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979), the defendants' alleged desire to protect Cummings, in my view, does not negate a possible showing of discriminatory intent. Whether Defendants desired to protect Cummings from criminal and civil liability or whether they intentionally discriminated against the Neaves because the Neaves wanted Defendants to investigate Cummings' role in their son's death raises a genuine question of fact for the jury. Because this issue is the very heart of the dispute, I cannot agree with the majority that it is "undisputed ... that any improper conduct by Defendants was motivated by a desire to protect the babysitter." Memorandum Disposition at 5.

Plaintiffs presented evidence that Gil and Doakes permitted Cummings to meet with Sergeant Roger Michael, Cummings' father, before they conducted their

investigative interview with her, and that Michael was permitted to maintain regular contact with the investigating officers about the status of the investigation in spite of the fact that he was worried Cummings might have harmed Scott Neaves. Further, the Neaves offered evidence that police officers in the San Diego Police Department considered their fellow officers and their relatives as "family," and that the officers involved in the investigation had known Sergeant Michael for more than 10 years. In addition, Defendants did not collect evidence from or take pictures of the crime scene, even though they closed off some parts of Cummings' home on the night Scott collapsed.

Presented with this evidence, a reasonable juror could find that Defendants treated the Neaves differently than other individuals whose children were victims of child abuse because Cummings was the suspected perpetrator of the Neaves' son's death. Put another way, because there is sufficient evidence in the record to show that Defendants had a constitutionally impermissible goal, adopted an impermissible means of achieving that goal, and their actions produced an impermissible effect, a reasonable juror could conclude that Defendants were motivated, at least in part, by a desire to intentionally treat the Neaves differently by conducting an inadequate investigation of their son's death without any rational basis. See Myers v. County of Orange, 157 F.3d 66, 74–76 (2d Cir. 1998); Backlund v. Hessen, 104 F.3d 1031, 1033–34 (8th Cir. 1997). Accordingly, I would reverse the district court's ruling on the Neaves' equal protection claim and remand that claim for further proceedings.

Case No. 99CV0005 (BTM) RBB

UNTIED STATES DISTRICT COURT
SOUTHER DISTRICT OF CALIFORNIA

RENEE NEAVES, et al.,
Plaintiffs,

v.

CITY OF SAN DIEGO, et al.,
Defendants.

Filed October 12, 2001

ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT

Defendants City of San Diego, Jerry Sanders, Roy Doakes, Frederico Gil Renee Hill, Roger B. Michael, Paul Redden, and Kevin Hoflen ("Defendants") have filed a motion for summary judgment. For the reasons discussed below, Defendants' motion is GRANTED.

I. BACKGROUND

This action arises out of the death of Scott Neaves, the infant son of plaintiffs Renee Neaves and David Neaves and brother of plaintiff Makenzie Neaves. Scott Neaves fell into a coma on March 29, 1996. while In the care of his day care babysitter, Wendy Cummings. Wendy Cummings is the daughter of defendant Roger B. Michael, a San Diego Police Traffic Sergeant.

Scott was rushed by ambulance to the Children's Hospital. Renee and David Neaves met their son at the hospital. While Renee and David were at the hospital,

Detective Doakes and Sergeant Hoflen took Makenzie, who was less than two years old at the time, from Cummings' house and placed her in San Diego Department of Social Services' Polinsky Children's Center.

Doctors at the Children's Hospital believed that Scott's injuries were suspicious and may have been caused by being shaken. Autopsy results initially indicated that the manner of Scott's death was "undetermined." However, an amended autopsy filed in January, 1997, concluded that Scott's death was "homicide." Cummings was not prosecuted because the District Attorney's Office concluded that the case against Cummings could not be proved beyond a reasonable doubt.

Plaintiffs allege that the defendant San Diego police officers engaged in a scheme to inadequately investigate Scott's death and to cover up, misrepresent, alter, conceal, and fabricate evidence in order to protect Cummings, the daughter of a fellow officer. Plaintiffs' Third Amended Complaint asserts two causes of action. The First Cause of Action, brought under 42 U.S.C. § 1983, alleges that Defendants deprived Plaintiffs of their constitutional right to access the courts and denied them their right to equal protection. The Second Cause of Action, also brought under 42 U.S.C. § 1983, alleges that Defendants violated Makenzie's Fourth, Fifth, and Fourteenth Amendment rights by removing her from the custody of her parents and placing her in the Polinsky Children's Center.

In an order dated February 26, 2001, the Court granted a Motion for Partial Summary Judgment brought by Defendants on Plaintiffs' First Cause of Action. The Court held that Plaintiffs could not show that they were denied meaningful access to the state courts because

Plaintiffs' wrongful death case against Cummings was still pending. The Court dismissed Plaintiffs' access to the courts claim without prejudice to refilling at the conclusion of the state court proceeding. As for Plaintiffs' equal protection claim, the Court held that Plaintiffs did not have a viable claim because they could not show that they were treated differently due to their membership in a particular class of persons.

In March 2001, Plaintiffs moved for reconsideration of the Court's February 26, 2001 order as it pertains to Plaintiffs' equal protection claim. Plaintiffs' motion was based upon Village of Willowbrook v. Olech, 528 U.S. 562 (2000), which holds that in certain cases, equal protection claims may be brought by a "Class of one." On May 17, 2001, the Court granted Plaintiffs' motion for reconsideration and reinstated Plaintiffs' equal protection claim.

II. DISCUSSION

A. EQUAL PROTECTION CLAIM

Defendants argue that they are entitled to summary judgment on Plaintiffs' equal protection claim because, among other things, Plaintiffs have failed to establish that Defendants acted with the requisite discriminatory intent. The Court agrees.

In traditional section 1983 actions based upon the violation of the Equal Protection Clause of the Fourteenth Amendment, the plaintiff "must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.," Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir, 1908), As explained by the Supreme Court, "'Discriminatory purpose' . . . implies more than

intent as volition or Intent as awareness of consequences. It implies that the decision maker. . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979). See also Maynard v. City of San Jose, 37 F.3d 1395, 1403 (9th Cir. 1994) (holding that the district court correctly explained that intentional discrimination means that a defendant acted at least in part because of a plaintiff's protected status).

In Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000), the Supreme Court held that equal protection claims may be brought by a "class of one," where "the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." There is nothing in this opinion which excuses such a plaintiff from the requirement of proving discriminatory intent.

Indeed, the facts of Village of Willowbrook, are consistent with the case law requiring the plaintiff to establish discriminatory purpose. In Village of Willowbrook, the plaintiff argued that the Village violated her equal protection rights by requiring that she grant the Village a 33 foot easement as a condition to connecting her property to the municipal water supply, The Village only required a 15 foot easement from other property owners seeking access to the water supply. The plaintiff claimed that the Village was intentionally discriminating against her because she had previously fled an unrelated, successful lawsuit against the Village.

Here, in contrast, there is no evidence that Plaintiffs were singled out or intentionally treated differently because of who they are. Viewing the facts in the light

most favorable to Plaintiffs, Defendants acted with the purpose of protecting Cummings, the daughter of a fellow officer, Although it was foreseeable that Plaintiffs would be harmed as a result, Defendants did not choose to act as they did based upon the effects of such actions on Plaintiffs.

Absent Ninth Circuit precedent to the contrary, the Court does not read I as eliminating the discriminatory intent requirement for plaintiffs claiming that they are a "class of one." To do so would open up the floodgates to litigation by individuals claiming that they, as a "class of one," were wrongfully denied benefits by state actors who did not act with the purpose of harming them but were aware of what effect their actions would have.

Plaintiffs have failed to show that Defendants acted with an intent or purpose to discriminate against them. Therefore, Defendants' motion is granted with respect to Plaintiffs' equal protection claim.

Defendants' motion for summary judgment on the equal protection claim must also be granted as to most of the defendants for lack of evidence from which a jury could reasonably find their participation in any conspiracy to deny plaintiffs the equal protection of the laws. There is no evidence of any policy by the City of San Diego not to thoroughly investigate allegations of criminal conduct by family members of police officers. Thus, there is no viable section 1983 claim against the City of San Diego under Monell v. New York City Dept. of Social Services, 436 U. S. 658 (1978). There is absolutely no evidence that former Chief of Police Gerald Sanders promulgated any policy that resulted in any failure to fully investigate Scott Neaves' death or that he in any way participated In limiting the investigation. Plaintiffs have also offered no

evidence from which a jury could conclude that defendants Renee Hill and Paul Redden were involved in a conspiracy to thwart a full investigation of Scott Neaves' death. The court therefore grants summary judgment on the first cause of action to these defendants due to a complete lack of evidence,

B. MAKENZIE'S § 1983 CLAIM

Plaintiff Makenzie Neaves claims that Defendants violated her Fourth, Fifth, and Fourteenth Amendment rights by removing her from the custody of her parents and placing her in the Polinsky Children's Center. Defendants counter that they are entitled to qualified immunity. For the reasons discussed below, the Court finds that Defendants did not violate Makenzie's rights and alternatively are shielded from liability by the doctrine of qualified immunity.

In determining whether qualified immunity applies, courts must first consider the threshold question, "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Saucier v. Katz, __ U.S. __, 121 S. Ct. 2151, 2156 (2001). If a constitutional violation is shown, the next step is to ask whether the right was "clearly established." Id. This inquiry must be "undertaken In light of the specific context of the case, not as a broad general proposition." Id.

In assessing whether a right Is "clearly established," courts must determine "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. at 2156. As explained by the Supreme Court, the qualified immunity doctrine allows far reasonable mistakes on the part of police officers:

The concern of the Immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An o officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal al in those circumstances. if the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Saucier, 121 S. Ct. at 2158.

The removal of a child from the custody of Its parent without prior judicial authorization violates the child's Fourth Amendment right to be free from illegal seizures and Fourteenth Amendment right to family association unless the information possessed by the officials at the time of the seizure is "such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury." Wallis v. Spencer, 202 F.3d 1126. 1138 (9th Cir, 2000). fn1 Plaintiffs argue that reasonable cause did not exist because Detective Doakes admitted during his deposition that he did not believe there was any threat or danger to Makenzie. (Doakes depo. (Plaintiffs' Exh. 27), 88:28-89:9.) Plaintiffs also argue that the scope of the intrusion was excessive because the police could have placed Makenzie into some form of protective custody with her father.

Summary judgment must be granted on the second cause of action for defendants City of San Diego and Gerald Sanders because there is no evidence that

supports any Monell claim based on a policy or practice. Further, there is no evidence that defendant Roger Michael was involved in or caused the removal of Makenzie Neaves to the Polinsky Center.

As to defendants Doakes and Hoflen, the court concludes that their actions did not violate Plaintiffs' rights. A reasonable officer confronted with the facts that: (1) Scott Neaves suffered three head injuries prior to March 29, 1996 (two at Cummings home and one at the Neaves home); (2) Scott had complained of headaches in the morning before being taken to Cummings home; (3) Scott collapsed at Cummings home; and (4) that the medical personnel believed that Scott had a serious head injury that may have been caused by shaking, would be reasonable in believing that Scott's sibling Makenzie was in imminent danger of serious bodily injury and that temporary removal was necessary to avoid that injury, Indeed, the court believes that had the police officers not temporarily removed Makenzie until the circumstances settled, and Makenzie was injured, these officers would have been subject to criticism for not doing their job. Under the emergent and evolving circumstances of March 29, 1996, Officers Doakes and Hoflen had sufficient and reasonable cause to temporarily remove Makenzie to the Polinsky Center.

Even If the Court assumes that Makenzie's Fourth Amendment and Fourteenth Amendment rights were violated, the evidence supports a finding of qualified immunity. Upon review of the facts and circumstances surrounding Makenzie's placement in the Polinsky Children's Center, the Court finds that it would not be clear to a reasonable officer that it was unlawful to place Makenzie in the temporary custody of the Center.

Plaintiffs do not dispute the following facts: (1) doctors at the Children's Hospital believed that Scott's Injuries were suspicious and resulted from nonaccidental trauma (Plaintiffs' Undisputed Fact 3); (2) Scott was in the care of Cummings immediately before being rushed to the Children's Hospital (Plaintiffs' Undisputed Fact 4); (3) on March 20, 1996, Renee Neaves told Det. Doakes that Scott had suffered three other head injuries (two at Cummings' home and one at his home while jumping up arid down on his bunk bed) during the 2½ - 3 weeks prior to his collapse (See Report of Det. Doakes, Plaintiffs' Exh. 7), Renee also told Det. Doakes that Scott was seen at Nav-Care on March 29,1996, prior to being dropped off at Cummings' home, because Scott began complaining of headaches after the series of head injuries. (Id.)

Under these facts, it was apparent that Scott's injuries may have been caused by physical abuse, but It was unclear whether the abuse took place at Cummings' home and/or at the Neaves' home. It would not have been clear to a reasonable officer faced with these facts that removal of Makenzie to the Polinsky Center would be in violation of plaintiffs' rights.

Plaintiffs argue that Defendants are not entitled to qualified immunity because Det. Doakes testified during his deposition that he did not believe there was a threat or danger to Makenzie. Plaintiffs also argue that the police reports do not show that David Neaves was suspected of inflicting any injury on Scott.

However, the standard for judging the defense of qualified immunity is an objective one. Harlow v. Fitzgerald, 457 U.S. 800, 817-19 (1982). "Evidence concerning the defendant's subjective intent is simply

irrelevant to that defense." Crawford-El v. Britton, 523 U.S. 574, 588 (1998).

In sum, even assuming that Makenzie's Fourth and Fourteenth Amendment rights were violated, Defendants are entitled to qualified immunity. Defendants did not violate "clearly established" rights. At worst, Defendants made a reasonable mistake regarding the applicable law. To hold Officers Doakes and Hoflen liable for any error in removing Makenzie to the Polinsky Center would have a chilling effect on police officers faced with child abuse situations. Officers would hesitate to act to protect the child at the risk of being held liable. This is precisely what the doctrine of qualified immunity is designed to prevent. The court holds that it would net be clear to a reasonable officer under the circumstances in this case that temporarily removing Makenzie was a violation of Plaintiffs' rights. Therefore, even if Officers Doakes and Hoflen erred in temporarily removing Makenzie, such mistake was not outside the range of reasonable mistakes covered by qualified immunity.

III. CONCLUSION

For the reasons discussed above, Defendants' motion for summary judgment 181-1] is GRANTED. The court notes that on September 3, 2001, the San Diego Superior Court dismissed the wrongful death action against Cummings. (See footnote 1 to Plaintiffs' Memorandum in Opposition to Defendants' Motion.) Plaintiffs shall have 45 days from the filing of this order to file an amended complaint renewing their claim of denial of access to the courts. The court retains jurisdiction for this purpose. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

Dated: October 11, 2001

HONORABLE BARRY TED MOSKOWITZ
United States District Judge

cc: Magistrate Judge Brooks
All parties and counsel of record

Footnotes

fn1 California Welfare and Institutions Code § 305 contains similar language. section 305 provides that any peace officer may, without a warrant, take into temporary custody a minor "[w]hen the officer has reasonable cause for believing that the minor is a person describe in Section 300, and, in addition . . . that the minor is in immediate danger of physical or sexual abuse, or the physical environment . . . poses an immediate threat to the child's health or safety."

Case No. 99CV0005 (BTM) RBB

UNTIED STATES DISTRICT COURT
SOUTHER DISTRICT OF CALIFORNIA

RENEE NEAVES, et al.,
Plaintiffs,

v.

CITY OF SAN DIEGO, et al.,
Defendants.

Filed February 21, 2002

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND GRANTING PLAINTIFFS' MOTION TO RE-TAX COSTS

Defendants City of San Diego, Jerry Sanders, Roy Doakes, Frederico Gil, Roger B. Michael, and Paul Redden ("defendants") have filed a motion to dismiss plaintiffs' fourth amended complaint. For the reasons discussed below, defendants' motion is GRANTED. Plaintiffs have filed a motion to re-tax costs of defendants. For the reasons discussed below, defendants' motion is GRANTED.

I. BACKGROUND

As the parties are familiar with the facts in this case, only a brief background is required as it relates to the instant motions.

Plaintiffs allege that the defendant San Diego police officers engaged in a scheme to inadequately investigate their son Scott's death and to cover, up, misrepresent,

alter, conceal, and fabricate evidence in order to protect Wendy Cummings, the daughter of a fellow officer. Plaintiffs brought a wrongful death action against Cummings in San Diego Superior Court on March 26, 1997. On July 29, 1997, Cummings filed a voluntary petition for relief in Bankruptcy Court, listing the wrongful death action and plaintiffs, and plaintiffs' counsel as creditors. The state court issued an automatic stay on proceedings pending the bankruptcy action. On November 5, 2001, the Bankruptcy Court filed a Discharge of Debtor Order releasing Cummings from all dischargeable debts.

In the Court's order dated February 26, 2001, the Court dismissed plaintiffs' section 1983 claim for access to courts without prejudice. The order explains that plaintiffs' access to courts claim cannot be decided while their wrongful death action is still pending in state court. See Delew v. Wagner, 143 F.3d 1219 (9th Cir. 1998) (holding that it was impossible to determine whether defendants' cover-up violated plaintiffs' right of access to the courts because plaintiffs had a wrongful death action pending in state court).

On July 25, 2001, the United States Bankruptcy Court filed an Order Denying [plaintiffs'] Motion to Reopen Bankruptcy Proceedings with respect to Wendy Cummings. The Bankruptcy Court explained:

Section 523(e) does not assist movants. The claims against the City of San Diego under the civil rights statute are not co-obligor claims for wrongful death; rather, any claims movants have against City arose after the alleged wrongful death. Debtor's discharge relieves her of any obligation to defend the state court action. Even though the judgment sought is not "personal;" her fresh start would be jeopardized if she were called upon

to defend a wrongful death suit or permit it to go to default, even in movants are not seeking to collect against her personally.

Finally, on September 3, 2001, the state court dismissed plaintiffs' wrongful death action without prejudice.

On October 11, 2001, the Court granted defendant's motion for summary judgment as to all claims except the access to courts claim. Noting that the state court had dismissed plaintiffs' wrongful death action, plaintiffs were given 45 days to file a fourth amended complaint renewing their claims of denial of access to state courts. Plaintiffs filed the fourth amended complaint on November 15, 2001.

II. DISCUSSION

A. Access to Courts

Defendants argue that plaintiffs cannot state a claim for denial of access to courts because it was the order by the bankruptcy court that denied plaintiffs access to the state courts, not the actions by the City or its officers. defendants rely primarily on the two cases cited in this Court's February 6, 2001 order, Delew v. Wagner, 143 F.3d 1219 (9th Cir. 1998) and Swekel v. City of River Rouge, 119 F.3d 1259 (6th Cir. 1997). Plaintiffs argue that defendants should not receive a "free pass" from liability based on the procedural maneuver of Cummings. However, plaintiffs are unable to cite any case upholding an access to courts claim where the alleged misdeeds of the police were not the direct or even proximate cause of the denial of access to courts.

Both Delew and Swekel hold that plaintiffs alleging a denial of meaningful access to works must actually

attempt to access state courts. specifically, plaintiffs most demonstrate that defendants pre-filing actions in covering-up evidence actually rendered any state court remedies ineffective. fee Delew, 143 F.3d at 1222; Swekel at 1264. For example, in Delew, plaintiffs brought a wrongful death action in state court against Kathleen Wagner, the driver of the vehicle that killed plaintiffs' family member Erin Delew. Kathleen Wagner was the wife of a police officer. While the wrongful death action was pending, plaintiffs discovered new evidence of a cover-up by the police and filed a section 1983 denial of access to courts action in state court against the City and the officers. The pity removed and the district court dismissed the action with prejudice. The Ninth Circuit reversed, holding that the district court should have dismissed without prejudice since the Delews' wrongful death action was still pending in state court and it was impossible to determine whether the defendant's cover-up actually "violated their right of access to courts by rendering 'any state court remedies ineffective'" ld. at 1223 (citing Swekel).

The cases cited by defendants do not directly address the causation issue currently before the court. Delew and Swekel require exhaustion of state court remedies in order to determine whether the defendant's alleged cover up "actually rendered" all state court remedies ineffective. The Sixth Circuit explained that the "plaintiff cannot merely guess that a state court remedy will be ineffective because of a defendant's actions." Swekel, 119 F.3 d at 1264. This exhaustion requirement ensures that the district court doesn't award damages for denial of access to courts when, in fact, plaintiffs are able to obtain "effective" and "meaningful" review. Here, it is now impossible to know if plaintiffs could ever obtain meaningful review of their wrongful death action since the bankruptcy court discharged Cummings from

any liability. In other word, the Swekel and Delew courts are concerned that plaintiffs are not awarded damages in excess of their actual injury. Here, plaintiffs have not demonstrated that they have suffered any constitutionally cognizable injury that is caused by defendants.

Nor are the cases cited by plaintiffs dispositive of the causation issue. Plaintiffs make two arguments in opposition to defendants' motion to dismiss. First, plaintiffs contend that the allegations that the police covered-up evidence is sufficient to state a claim far denial of access, Plaintiffs cite Ryland v. Shapiro, 708 F.3d d 967 (5th Cir. 1983) to support this contention. In Ryland, the district court refused to recognize a cause of action for denial of access to courts where the plaintiffs alleged that a police cover-up had caused an eleven month delay in their pursuit of a state law tort action against officer Shapiro, who was responsible far their daughter's death.

Notably, the plaintiffs in Ryland had not yet filed any action against Shapiro in state court, The Fifth Circuit reversed, explaining that such a right is encompassed in the Privileges and Immunities Clause, the First Amendment and the Due Process Clause. Ryland, 708 F.3d 971-72. However the Fifth Circuit did not decide the scope of the cause of action for denial of access to courts since the district court had refused to recognize the cause of action. Thus, the language relied upon by defendants was dicta:

The defendants' actions could have prejudiced the Rylands' chances of recovery in state court because the resulting delay would cause stale evidence and the fading of material facts in the minds of potential witnesses. Moreover, it could well prove more

expensive to litigate such an action Finally, any interference with a substantive constitutional right, such as the right of access to courts, may by itself, amount to a constitutional deprivation (unless reasonably justified by a countervailing state interest).

Rylands at 974-75. To the extent that the quoted language enables plaintiffs in the Fifth Circuit to state a claim for denial of access to courts before attempting to access state courts, this is not the lave in the Ninth Circuit. See Delew, 143 F.3d at 1223. Furthermore, the court does not read Rylands to mean that plaintiffs have a constitutional right to thorough police investigation. Such a claim is too generalized for the purposes of standing and is not encompassed in the right of access to courts. Second, plaintiffs argue that the "futility" exception applies. indeed, several courts have recognized that in sore instances it would be futile to require plaintiffs to attempt to access the state court system before bringing their federal action for denial of access to courts. See Swekel, 199 F.3d at 1264 n,2 (recognizing exception but stating that plaintiffs have not presented any evidence of futility). However, these cases suggest that the futility exception applies where the defendant's conduct caused the futility. Plaintiffs have not cited any case that recognized the exception where the futility was caused by intervening circumstances, For example, the Tenth Circuit in Stump v. Gates , 211 F.3d 527 (10th Cir. 2000) recognized the futility exception where the defendants' cover-up of the cause of death precluded the filing of a wrongful death action in state court. Similarly, the DC circuit in Harbury v. Deutch, 233 F.3d 596 (DC Cir. 2000) reversed the district court's dismissal of the plaintiff's access to courts claim where she had not finished prosecuting the tort claims in state court. The Harbury court distinguished Swekel and Delew (which dismissed

access to courts claims while state actions were pending an the grounds that Harbury's complaint alleged that but-for the saver-up she could have saved her now-deceased husband's life. Since her husband had already died, the injunctive relief sought in state court was futile The Harbury court explained that the futility was caused by the CIA defendants who "effectively concealed most of the `essential facts' of the case, including U.S. government involvement, until after emergency injunctive relief would have been futile." Harbury, 233 F.3d at 609. Here, the futility exception does not apply because the futility was caused by operation of the United States bankruptcy laws, not the actions of defendants. Plaintiffs do not contend that the actions of defendants hindered them in opposing Cummings' discharge in the bankruptcy court. Plaintiffs have a political remedy, in that they can lobby the police department to investigate whether the police officers should be disciplined. But they do not state a claim far access to courts.

In Lewis v. Casey , 518 U.S. 342 (1996), the Supreme court held that a prisoner does not state a claim for violation of the constitutional right of access to courts by simply establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. Rather, the inmate "must go one step further and demonstrate that the alleged shortcoming in the library or legal assistance program in some way hindered his efforts to pursue a legal claim." Lewis, 518 U.S. at 351. Otherwise, the prisoner cannot demonstrate that he has suffered actual injury sufficient far constitutional standing. Id. at 349 Here, like the prisoners in Lewis, plaintiffs argue that they were denied access to courts based an the alleged cover-up in the Police Department. Plaintiffs' allegations about the subpar police work are

too theoretical to demonstrate actual injury for denial of access to courts.

In addition, to have standing, a plaintiff must allege and prove that his injury is fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. Allen v. Wright, 468 U.S. 737, 751 (1995). Here, the injury is denial of access to courts. However, the injury is not traceable to the actions of the City or its officers, Plaintiffs' failure to obtain relief is traceable, instead to the bankruptcy court. Furthermore, even if this court allowed the plaintiffs' claim to go forward, this court could not redress the plaintiffs' inability to obtain compensation from Wendy Gummings.

Finally, plaintiffs argue that the violation of constitutional rights will support a claim for nominal damages without showing of actual injury. In support of this contention, plaintiffs cite two -SS- 1983 police brutality cases where the Ninth circuit reversed dismissals against the pity where the plaintiffs had already been fully compensated for their injuries by the individual officers. See Ruvalcaba v. City of Los Angeles, 167 F.3d 514, 524 (9th Cir. 1999); Larez v. City of Las Angeles, 946 F.2d 630 (9th Cir. 1991). These cases are distinguishable. In these police brutality cases, there was no question that the defendants caused the constitutional injury. The issue in these cases is whether plaintiffs suffered injury after being compensated by some, but not all, of the defendants. Here, in contrast, plaintiffs cannot show that the defendants ceased the denial of access to courts. Thus, even an award of nominal damages would be inappropriate since they did not deny plaintiffs "meaningful and effective" access to courts.

Plaintiffs contend that the defendants denied then access to the courts by not properly investigating Cummings. The result, plaintiffs argue, is that they cannot successfully obtain a judgment against Cummings for wrongful death of their child. However, it is impassible to tell whether defendants' alleged actions impaired plaintiffs' case against Cummings because she has been legally discharged from liability. In sum, the plaintiffs cannot show that the defendants denied their access to courts since the Boars of the state courts were closed by the bankruptcy court, not the defendants. The state court action was dismissed without prejudice, Thus, if Wendy Cummings' bankruptcy status is dissolved and the plaintiffs are permitted to refile in state court, this court could entertain plaintiffs' access to courts claim following the termination of the state court proceedings. Therefore, the Fourth Amended Complaint is dismissed without prejudice since the state court action was also dismissed without prejudice.

B. Motion to Re-Tax Costs

Plaintiffs have moved to strike or re-tax costs awarded by the Clerk in the amount of $9,,112.38. Federal Rule of Civil Procedure 54(d)(1) provides that "costs other than attorneys' fees shall be allowed a of course to the prevailing party unless the court otherwise directs." By its terms, the rule creates presumption in favor of awarding casts to a prevailing party, but vests in the district court discretion to refuse to award costs. See National Info. Servs., Inc. v. TRW, Inc., 51F.3d 1470, 1471 (9th Cir. 1995). That discretion is not unlimited. A district court must "specify reasons" for its refusal to award casts. Subscription Television Inc. v. Southern Cal. Theatre Owners Assn, 576 F.2d 230, 234 (9th Cir. *592 1978).

The Ninth Circuit has approved the following reasons far refusing to award costs to a prevailing party: the losing party's limited financial resources, see National Org. for Women v. Bank of Cal., 680 F.2d 1291, 1294 (9th Cir.1982); and misconduct an the part of the prevailing party, see National Info. Servs., 51 F.3d at 1472. Further, in Stanley v. University of Southern California, 178 F.3d 1069, 1079-80 (9th Cir. 1998), the Ninth Circuit held that the district court abused its discretion in denying a lacing civil rights plaintiffs motion to re-tax costs without considering (1) the plaintiff's limited financial resources; and (2) "the chilling effect of imposing such high casts on future civil rights litigants."

Plaintiffs give four reasons whir they are entitled to a re-taxing of casts. First, plaintiffs argue that pursuant to CivLR 54.1.b.2.a "copies of transcripts far counsel's own use are not taxable in the absence of a special artier of the court." Thus, plaintiffs argue that defendants improperly seek to recover $8488.40 paid for deposition transcripts far counsel's own use. Plaintiffs are correct. Far the reasons set forth an the record at the hearing on January 30, 2002 and pursuant to CivLR 54.1.b.3, defendants are entitled to recover costs far depositions noticed and taken by them. These depositions include:

Paul Minor	$ 340.35
Rhonda Roe	301.25
Tara Lane	293.75
David Neaves	363.00
Earl Pahlow	813.75
Renee Neaves	498.75
TOTAL	$2,610.85

Defendants are not entitled to costs for the copy of a deposition taken by plaintiffs. CivLR 54.1.b.3.a. Thus, defendants ore entitled to no more than $2610.85 plus $90.00 (fees for service of subpoena) plus $533.98 fees for witnesses), for a total of $3234.83.

Second, plaintiffs argue that they have limited financial resources relative to the City of San Diego. Plaintiffs have submitted declarations providing the Court with evidence of their inability to pay. Plaintiff Renee Neaves was laid off from her position as a receptionist where she earned $7.00 per hour and is currently unemployed. Her husband, plaintiff David Leaves earns $13.50 per hour. His income provides the sole source of income for plaintiffs' two children. Plaintiffs expenses are approximately $1,600 per month. Third, plaintiffs argue that it would be "patently unfair" to impose costs on a guardian ad litem for a minor plaintiff. Here, Makenzie, a minor, was represented by her maternal grandfather.

Finally, plaintiffs argue that an award of casts is premature and inappropriate since the action has not been entirely adjudicated. ether circuits have held that where a party is only partially successful, it is not an abuse of discretion to deny costs. AeroTech, lnc., v. Estes, 110 F.3d 1523, 1526 (10th Cir. 1997). Here, however, the action has been entirely adjudicated since the Court has granted defendants' motion to dismiss the Fourth Amended Complaint.

The Court finds that plaintiffs brought non-frivolous claims far violations of their civil and constitutional rights. Plaintiffs have suffered a terrible tragedy and sought compensation for the lass of their son Scott. Although this court holds that plaintiffs' claim for constitutional access to courts is barred by operation of the United States bankruptcy It s, plaintiffs pursued a

motion to reopen the bankruptcy proceeding during the course of this federal action. Furthermore, plaintiffs have demonstrated their very limited ability to pay $3,234.83 in costs. The court finds that civil rights claims might be "chilled" where employed low-income plaintiffs, such as the Neaves, are burdened with casts in excess of twice their monthly expenses. Stanley v. University of Southern California, 128 F.3d at 1079-80. Therefore, the court vacates the award of costs.

III. CONCLUSION

For the reasons discussed above, defendants' motion to dismiss plaintiffs' fourth amended complaint [112-1] is GRANTED. In addition, plaintiffs motion to retax costs [110-1] is GRANTED. The Clerk shall enter judgment for defendants dismissing this case without prejudice and without costs and fees.

IT IS SO ORDERED.

Dated: February 20, 2002

HONORABLE BARRY TED MOSKOWITZ
United States District Judge

cc: Magistrate Judge Brooks
All parties and counsel of record

Case No. 99CV0005 (BTM) RBB

UNTIED STATES DISTRICT COURT
SOUTHER DISTRICT OF CALIFORNIA

RENEE NEAVES, et al.
Plaintiffs,

v.

SAN DIEGO CITY OF SAN DIEGO, et al.,
Defendants.

Filed February 21, 2002

JUDGMENT IN A CIVIL CASE

X DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT the defendant's motion to dismiss fourth amended complaint Judge Barry Moskowitz is granted, plaintiff's motion to strike or re-tax costs is granted; the Clerk shall enter judgment for defendants dismissing this case without prejudice and without costs and fees. . .

Date: 2/21/02

W. Samuel Hamrick, Jr./Clerk
By K. Ridgeway/ Deputy Clerk

Entered on 2/21/02

pre - Moskowitz
ref – Brooks